UNITED STATES V. MARY A. MATTEY

A–28009 *Decided February 29, 1960*

Mining Claims: Discovery—Mining Claims: Common Varieties of Minerals

To satisfy the requirements for discovery on a placer mining claim located for a deposit of clay, it must be shown that the clay is not only marketable at a profit but that it is not a common clay suitable only for the manufacture of ordinary brick, tile, pottery, and similar products.

Mining Claims: Discovery—Mining Claims: Common Varieties of Minerals

A deposit of clay which contains impurities useful as flux material in the manufacture of sewer pipe but which is not of an unusual or exceptional nature is a common clay where it is clear that all common clays possess the same substances and in more or less the same degree.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The United States has appealed to the Secretary of the Interior from a decision dated December 22, 1958, of the Director of the Bureau of Land Management which affirmed a decision by a hearing examiner dismissing its protest against a placer mining claim patent application filed by Mary A. Mattey for lands situated in the Cleveland National Forest, California.

In its protest the United States, through the Forest Service, United States Department of Agriculture,[1] alleged that no discovery of mineral had been made and that the land is nonmineral in character.

The patent applicant filed an answer in which she stated that the claim, the Grape Vine Placer Mining Claim, contained a deposit of clay of commercial value, estimated to contain more than 250,000 tons, which has been and is being used in the manufacture of various clay products, including sewer pipe.

Thereafter, on January 29, 1957, a hearing was held before a hearing examiner on the charges made by the Forest Service. The basic facts adduced at the hearing are not in dispute.

The claim, which is near Corona, California, contains a deposit of sedimentary shale or clay used by the Tillotson Refractory Company in the manufacture of vitrified sewer pipe at its plant in Corona. It appears that, after several years of experimentation, the company began to use the clay in substantial amounts in October 1956 and in the 3 months preceding the hearing had used a total of about 4,300 tons (Transcript of Hearing, p. 46). The shale is combined with better quality and rarer clays to produce a mix with certain desired characteristics. The shale constitutes 65 percent of the mixture, a local

[1] 43 CFR, 1954 ed., 205.6; as revised 43 CFR, 1958 Supp., 205.2.

residual clay from adjoining land owned by Tillotson 20 percent, and a purchased ball clay 15 percent. (Tr. 48–49.) The shale clay is used as the bulk substance (Tr. 107). While ordinary earth could be used in its place, to do so would require a much higher proportion of the better clays in the mix (Tr. 107–8). In addition, the shale contains "impurities" which are essential to the production of a good grade of sewer pipe at a reasonable cost. These "impurities" are chiefly iron oxide and sodium and potassium oxide, the first of which gives the product a desirable red color and the latter makes possible the vitrification of the clay at lower temperatures. (Tr. 53, 55–56, 132–133.)

There are several other similar deposits of shale in privately owned lands in the vicinity, which are controlled either by Tillotson or other manufacturers (Tr. 52). There are also extensive deposits of shale nearby higher up in the forest (Tr. 53, 109–111, 120, 134–135).

The hearing examiner dismissed the protest, holding that there was a market for the shale deposit; that, because of the flux materials in it, the shale is usable for purposes other than making common brick; and that as a result there has been discovery of a valuable mineral and the land is mineral in character.

The Director affirmed the hearing examiner's decision on the ground that the shale is peculiarly valuable for the manufacture of sewer tile because of the chemical composition of the clay and the flux materials contained in it. The Director stated that common or ordinary deposits of clay would not constitute minerals subject to location under the mining laws.

The United States has appealed on the grounds that a shale deposit of the nature of the one found on the claim is not and never has been subject to location under the mining laws, and that, even if it once was, it no longer is because of the enactment of section 3 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 611), which states that common varieties of certain minerals shall not be deemed a valuable mineral deposit under the United States mining laws.

Under the mining laws all valuable mineral deposits in the public lands are open to exploration and purchase and the lands in which they are found are open to occupation and purchase except as they may have been withdrawn or reserved for other disposition (30 U.S.C., 1958 ed., sec. 22). While the lands remain open and until other rights have attached to them, the discovery of a valuable mineral deposit within the limits of the claim will validate the claim (30 U.S.C., 1958 ed., secs. 23, 25) if other requirements of the law have been met. In order to satisfy the requirements of discovery on a mining claim located for a deposit of one of the mineral substances of wide occurrence, such as clay, it must be shown that the deposit can be extracted and

removed at a profit. This includes a favorable showing as to the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. *United States* v. *Everett Foster et al.*, 65 I.D. 1 (1958), and cases cited, affirmed *Foster* v. *Seaton*, 231 F. 2d 836 (1959); *United States* v. *John B. Kathe, Jr.*, A–27744 (November 19, 1958).

However, not every deposit of clay for which a market exists can serve as the basis for the validation of a mining claim. The Department has never recognized marketability as the sole test of the validity of a mining claim of this nature. In *Dunluce Placer Mine*, 6 L.D. 761 (1888), and *King et al.* v. *Bradford*, 31 L.D. 108 (1901), the Department held that a deposit of ordinary brick clay could not be entered under the mining laws. In *Holman et al.* v. *State of Utah*, 41 L.D. 314 (1912), the Department said:

> It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would, on this account, be excluded from homestead and other agricultural entry. * * * It is not intended hereby to rule that there may not be deposits of clay and limestone of such exceptional nature as to warrant entry of the lands containing such deposits under the mining law. (P. 315.)[2]

The Department made clear to Congress its view that marketability alone is not sufficient to validate a mining claim based on a deposit of clay. In commenting on the bill which became the Materials Act of July 31, 1947 (30 U.S.C., 1958 ed., sec. 601 *et seq.*), which authorizes the Secretary to sell certain materials on public lands of the United States, the Under Secretary of this Department stated:

> There are on the public lands many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection. There is, however, no permanent legislation under which these may be utilized. * * *
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> Included in the materials to which it is contemplated the proposed bill would apply are:
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> 2. Sand, stone, and gravel not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.
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[2] See also *Mrs. A. T. Van Dolah*, A–26443 (October 14, 1952).

4. Common earth to be used for road fills, earth dams, stock-watering reservoirs and similar uses.

5. Clay to be used for the manufacture of bricks, tile, pottery, and similar products. (S. Rept. No. 204, 80th Cong., 1st sess.)

The Department has restated its position several times. *Mrs. A. T. Van Dolah*, *supra*, fn. 2; *cf. United States* v. *Everett Foster et al.*; *United States* v. *P. D. Proctor et al.*, A–27899 (May 4, 1959).

Thus, the Department has long construed the mining laws as not validating a mineral location based upon a deposit of sand and gravel merely because there is some market for it. A long continued and uniform administrative interpretation of a statute is entitled to great weight in its construction. *United States* v. *Wyoming*, 331 U.S. 440, 454 (1947); *Lykes* v. *United States*, 343 U.S. 118, 126–127 (1952); *United States et al* v. *American Trucking Associations, Inc., et al.*, 310 U.S. 534, 549 (1940). Particularly is this so where Congress has accepted and acted upon the basis of the administrative interpretation. *Brooks* v. *Dewar et al.*, 313 U.S. 354, 360, 361 (1941).

On the other hand, the Department has held that lands containing deposits of clay of an exceptional nature may be entered under the mining laws. *United States* v. *Barngrover et al.* (*On Rehearing*), 57 I.D. 533 (1942); *Fred B. Ortman*, 52 L.D. 467, 469 (1928); see also *Mrs. A. T. Van Dolah*, *supra*; *Holman et al.* v. *State of Utah*, *supra*.

The contestee's position on the law is not too clear. On the one hand, she seems to contend that even common clay is subject to location under the mining law so long as it is marketable. On the other hand, particularly in answer to the contestant's present appeal, she asserts that the clay deposit in question has a distinct and special value, as the Director found. Of course, if the first proposition is true, it would be unnecessary to determine whether the Mattey clay or shale possessed an uncommon value. All that would have to be ascertained is whether the clay is in present demand and is marketable.

For the first proposition, the contestee relies heavily upon *Layman et al.* v. *Ellis*, 52 L.D. 714 (1929), which overruled *Zimmerman* v. *Brunson*, 39 L.D. 310 (1910). In the *Zimmerman* case, the Department held that sand and gravel, which had no peculiar property or characteristic but had been used in making concrete for building purposes and whose chief value derived from its proximity to town, were not minerals subject to mining location. The decision cited, among other cases, *Dunluce Placer Mine* and *King et al.* v. *Bradford*, *supra*. *Layman et al.* v. *Ellis* also involved gravel deposits which had been sold for use in road and building construction on the State highway system. Holding that the deposits were subject to mining location, the Department pointed to the pronounced and widespread economic value of gravel and the fact that it is definitely classified

as a mineral product in trade and commerce. However, the *Layman* case did not rely upon marketability alone. The Department said:

> Good reason also exists for questioning the statement [in the *Zimmerman* case] that gravel has no special properties or characteristics giving it special value. While the distinguishing special characteristics of gravel are purely physical, notably, small bulk, rounded surfaces, hardness, these characteristics render gravel readily distinguishable by any one from other rock and fragments of rock and are the very characteristics or properties that long have been recognized as imparting to it utility and value in its natural state. (52 L.D., at 720.)

In other words, the Department seemed to be indicating that *gravel* is a *rock* of special and distinct value because of its physical characteristics, and, therefore, that as a *rock* of peculiar value it is subject to mining location just as rock of special value for building purposes is subject to mining location.

However this may be, *Layman et al.* v. *Ellis* was confined to gravel and considerations pertaining to gravel. It did not in terms or by necessary implication overrule *King et al. v. Bradford* or *Holman et al.* v. *State of Utah.* In fact, in *Mrs. A. T. Van Dolah, supra*, decided many years after the *Layman* case, the *Holman* case was cited in support of the proposition that common clay cannot be located under the mining laws although clay of an exceptional nature may be.

In addition, it is clear from the terms of the Materials Act of July 31, 1947, its legislative history, and the Department's construction of the act, that common clay is not subject to disposition under the mining laws. It only remains then to determine whether the clay and shale deposit on which the appellant's claim is founded is a common clay or a clay of exceptional nature.

The only unusual qualities attributed to the deposit are that it contains certain "impurities" and is used in the manufacture of vitrified sewer pipe. The impurities, or flux materials, however, are merely the ordinary substances found in common clay. Indeed, it is their presence in appreciable amounts which differentiates the common clays from the less common clays (Tr. 119).[3] There is nothing in the record to indicate that the Mattey shale contains flux materials in unusual combinations or that it is different in composition from any other common clay. The only comparison made was between the shale and common dirt as a bulk material for the clay mixture used in manufacturing the sewer pipe. The fact that there the advantages are in favor of using shale over common earth is hardly sufficient to warrant classifying the shale as uncommon.

Turning now to its use in the manufacture of sewer pipe, we must first note that sewer pipe is generally classified as a heavy clay product

[3] See "Mineral Commodities of California," Bulletin 176, Division of Mines, Department of Natural Resources, State of California, 1957, pp. 143–148.

along with brick and drain tile; the clay used for such a purpose may well fall within the uses of clay which the discussion above demonstrated would not validate a mining claim. However, it is not necessary to rest on this ground because if the deposit is in itself of the type of clay not subject to location under mining laws, the fact that it is used in combination with purer clays cannot remove it from the proscribed category. In other words, the use to which a common clay is put cannot make the lands in which it is found subject to location under the mining laws, if the use is not dependent upon any unusual characteristics of the clay itself. It would be different if a clay with unusual characteristics which could be used in the manufacture of ordinary brick were used to made a product for which its unusual characteristics were essential. In this case the Mattey shale has no qualities that it does not share with other common clays and it is used only as any other common clay could be used.

Consequently, I cannot find that it is a mineral subject to location under the mining laws or that the land in which it is found is, because of it, mineral in character. Accordingly, I conclude that there has been no discovery of a valuable mineral on the claim, that the protest against the patent application was improperly dismissed, and that the patent application should be rejected and the claim held null and void.

This conclusion makes it unnecessary to consider the contestant's allegations that under the act of July 23, 1955, *supra*, common clay is not a locatable mineral.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is reversed and the case is remanded for further proceedings consistent herewith.

EDMUND T. FRITZ,
Deputy Solicitor.

ALUMINA DEVELOPMENT CORPORATION OF UTAH ET AL.

A-28171 *Decided February 29, 1960*

Multiple Mineral Development Act: Verified Statement

The verified statement filed by a mining claimant pursuant to section 7 of the act of August 13, 1954, must be under oath.

Multiple Mineral Development Act: Verified Statement

Where an officer of a corporation filing a statement pursuant to section 7 of the act of August 13, 1954, subscribes his signature to a statement that he is making the statement under oath and a notary public signs and seals an acknowledgment of the officer's signature, the statement is considered to have been made under oath and thus verified.